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Class action against Temu stayed, arbitration clause approved

By Devon Belcher
Daily Journal Staff Writer

A federal judge in San Diego stayed a putative class action against digital marketplace Whaleco Inc. after granting the company's motion to arbitrate claims that it deceives consumers with inflated discounts on its website, Temu.

The primary dispute between the parties regarding the arbitration matter was whether an arbitration agreement in the company's terms of use is clearly provided to users who register accounts on its website.

On Nov. 25, U.S. District Judge Anthony J. Battaglia found Temu's arbitration agreement is reasonably enforced, and he stayed the case pending arbitration, with the exception of the plaintiffs' request for public injunctive relief.

"First, because Temu's Arbitration Agreement enables consumers to opt out through written notice within thirty days, Temu's arbitration agreement is not adhesive. ... Accordingly, plaintiff had a sufficient opportunity to opt out of the arbitration agreement," Battaglia wrote.

While the judge acknowledged the arbitration itself did not appear until the terms' ninth page, he found a section on the first page includes, in bold-face capitals: "AMONG OTHER THINGS, AN AGREEMENT TO ARBITRATE WHICH REQUIRES, WITH LIMITED EXCEPTIONS, THAT ALL DISPUTES BETWEEN YOU AND US BE RESOLVED BY BINDING AND FINAL ARBITRATION."

The company's counsel is led by Latham & Watkins LLP partner Steven N. Feldman. The plaintiff and putative class are led by Schonbrun Seplow Harris Hoffman & Zeldes LLP partner Helen I. Zeldes. Neither of the lead attorneys were available for comment by press deadline Friday.

Whaleco, which offers online shoppers largely discounted products that are primarily manufactured and shipped from China, owns and operates Temu. In the complaint, the named plaintiff said the company violated several California consumer laws by listing inflated reference prices for products to deceive consumers into believing they were buying main line retail products at a discount.

Additionally, the named plaintiff, on behalf of a proposed nationwide consumer class, claimed they were misled into paying more for Whaleco's products than they would have paid at face value. *Kohler v. Whaleco Inc.*, 3:24-cv-00935 (S.D. Cal., filed May 28, 2024).

In Whaleco's arbitration motion, Feldman successfully argued that Temu's terms mandated arbitration. Specifically, according to the motion, registered Temu users agree to an arbitration agreement that bars them from pursuing claims in a putative class action.

Zeldes, for the consumers, argued Temu failed to submit sufficient evidence that established her client knowingly consented to the arbitration agreement when she registered her account. Even in the event that it was established, Zeldes argued the company's arbitration enforcement in this instance is unfairly structured and should thus be void.

Battaglia, while referring to the term's arbitration section on its first page, found the plaintiff's counsel did not meet her burden to demonstrate procedural unconscionability.

"Procedural unconscionability measures the degree of 'oppression' or 'surprise' during contract formation. ... The first page of Temu's terms therefore explicitly notifies users of the arbitration agreement, as well as the opportunity to opt out, mitigating plaintiff's concern of any undue surprise," Battaglia wrote.

devon_belcher@dailyjournal.com